

ARKANSAS SUPREME COURT

No. CR 05-649

IAN JAY SMITH
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered September 28, 2006

PRO SE PETITION FOR REHEARING
[CIRCUIT COURT OF BENTON
COUNTY, CR 2002-289, HON. TOM J.
KEITH, JUDGE]

PETITION DENIED

PER CURIAM

Appellant Ian Jay Smith entered a guilty plea to three counts of rape and was sentenced as a habitual offender to an aggregate of thirty years' imprisonment in the Arkansas Department of Correction. He timely filed in the trial court a petition for postconviction relief under Ark. R. Crim. P. 37.1 that was denied. This court affirmed the denial of postconviction relief in an unpublished opinion. *Smith v. State*, CR 05-649 (Ark. June 22, 2006) (*per curiam*). Appellant now brings this *pro se* petition for rehearing of that decision.

Rule 2-3(g) of the Rules of the Arkansas Supreme Court provides that a petition for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain and not to repeat arguments already considered and rejected by this court. The petition must cite to facts the appellant contends were overlooked and provide references to the abstract or addendum as required by Ark. Sup. Ct. R. 2-3(h).

Here, appellant would have us remand or order rebriefing, citing to a case in which the

abstract was deficient. However, as we indicated in our opinion, we declined to reach the merits of appellant's arguments on three points, not simply due to an inadequate abstract, but because appellant failed to provide an adequate record. It is true that we order rebriefing in accordance with Ark. Sup. Ct. R. 4-2(b)(3) where an appellant has merely provided an inadequate abstract. That is not the case here.

As noted in our opinion, we could not find that the trial court's findings were clearly erroneous on appellant's claims as to ineffective assistance of counsel, whether the plea was voluntarily, intelligently and knowingly entered, or on the appropriateness of a hearing, because appellant did not include in the record the transcript of his plea hearing. An order for rebriefing would not cure the deficiency because appellant never requested supplementation of the record so that his brief could include an abstract of the plea hearing.

This court has repeatedly stated that it is the appellant's burden to bring up a record sufficient to demonstrate that the trial court was in error, and where the appellant fails to meet its burden, this court has no choice but to affirm the trial court. *Davidson v. State*, 363 Ark. 86, ____ S.W.3d ____ (2005). *See also Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001). As the State notes in its response, this issue was raised in the State's brief and yet appellant has not previously submitted a request to supplement the record. Under the circumstances, appellant cannot now request supplementation of the record to cure the deficiencies, after this court has issued its decision. As appellant has failed to show error in our previous decision, we deny the petition for rehearing.

Petition denied.